

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

LIFE TECHNOLOGIES CORPORATION,
and APPLIED BIOSYSTEMS, LLC,

No. C 12-00852 WHA

Plaintiffs,

v.

BIOSEARCH TECHNOLOGIES INC.,
BIO-SYNTHESIS, INC., and EUROFINS
MWG OBERON, INC.,

Defendants.

**CASE MANAGEMENT ORDER,
REFERENCE TO MAGISTRATE
JUDGE FOR SETTLEMENT/
MEDIATION, AND CONFIRMING
REFERENCE TO MAGISTRATE
JUDGE FOR DISCOVERY
SUPERVISION**

After a case management conference, the Court enters the following order pursuant to Rule 16 of the Federal Rules of Civil Procedure ("FRCP") and Civil Local Rule 16-10:

1. All initial disclosures under FRCP 26 must be completed by **APRIL 16, 2012**, on pain of preclusion, including full and faithful compliance with FRCP 26(a)(1)(A)(iii).
2. The motion to reconsider the claim construction order will be heard on **MAY 9, 2012, AT 1:30 P.M.** with a tutorial on **APRIL 25, 2012, AT 1:30 P.M.** (see Dkt. No. 315).
3. The non-expert discovery cut-off date shall be **JULY 31, 2012**.
4. The deadline for producing opinions of counsel under Patent Local Rule 3-8 shall be **28 CALENDAR DAYS** before the non-expert discovery cut-off, irrespective of the timeline in said rule.

1 5. Subject to the exception in the next paragraph, the last date for designation of expert
2 testimony and disclosure of full expert reports under FRCP 26(a)(2) as to any issue on
3 which a party has the burden of proof (“opening reports”) shall be **JULY 31, 2012**.
4 Within **FOURTEEN CALENDAR DAYS** of said deadline, all other parties must disclose any
5 expert reports on the same issue (“opposition reports”). Within **SEVEN CALENDAR**
6 **DAYS** thereafter, the party with the burden of proof must disclose any reply reports
7 rebutting specific material in opposition reports. Reply reports must be limited to true
8 rebuttal and should be very brief. They should not add new material that should have
9 been placed in the opening report and the reply material will ordinarily be reserved for
10 the rebuttal or sur-rebuttal phase of the trial. If the party with the burden of proof
11 neglects to make a timely disclosure, the other side, if it wishes to put in expert
12 evidence on the same issue anyway, must disclose its expert report within the
13 fourteen-day period. In that event, the party with the burden of proof on the issue may
14 then file a reply expert report within the seven-day period, subject to possible exclusion
15 for “sandbagging” and, at all events, any such reply material may be presented at trial
16 only after, if at all, the other side actually presents expert testimony to which the reply
17 is responsive. The cutoff for all expert discovery shall be **FOURTEEN CALENDAR DAYS**
18 after the deadline for reply reports. In aid of preparing an opposition or reply report, a
19 responding party may depose the adverse expert sufficiently before the deadline for
20 the opposition or reply report so as to use the testimony in preparing the response.
21 Experts must make themselves readily available for such depositions. Alternatively,
22 the responding party can elect to depose the expert later in the expert-discovery period.
23 An expert, however, may be deposed only once unless the expert is used for different
24 opening and/or opposition reports, in which case the expert may be deposed
25 independently on the subject matter of each report. At least **28 CALENDAR DAYS** before
26 the due date for opening reports, each party shall serve a list of issues on which it will
27 offer any expert testimony in its case-in-chief (including from non-retained experts).
28 This is so that all parties will be timely able to obtain counter-experts on the listed

1 issues and to facilitate the timely completeness of all expert reports. Failure to so
2 disclose may result in preclusion.

3 6. As to damages studies, the cut-off date for *past damages* will be as of the expert report
4 (or such earlier date as the expert may select). In addition, the experts may try to
5 project *future damages* (*i.e.*, after the cut-off date) if the substantive standards for
6 future damages can be met. With timely leave of Court or by written stipulation, the
7 experts may update their reports (with supplemental reports) to a date closer to the
8 time of trial.

9 7. At trial, the direct testimony of experts will be limited to the matters disclosed in
10 their reports. Omitted material may not ordinarily be added on direct examination.
11 This means the reports must be complete and sufficiently detailed. Illustrative
12 animations, diagrams, charts and models may be used on direct examination only if
13 they were part of the expert's report, with the exception of simple drawings and
14 tabulations that plainly illustrate what is already in the report, which can be drawn by
15 the witness at trial or otherwise shown to the jury. If cross-examination fairly opens
16 the door, however, an expert may go beyond the written report on cross-examination
17 and/or redirect examination. By written stipulation, of course, all sides may relax these
18 requirements. For trial, an expert must learn and testify to the full amount of billing
19 and unbilled time by him or his firm on the engagement.

20 8. To head off a recurring problem, experts lacking percipient knowledge should avoid
21 vouching for the credibility of witnesses, *i.e.*, whose version of the facts in dispute is
22 correct. This means that they may not, for example, testify that based upon a review of
23 fact depositions and other material supplied by counsel, a police officer did (or did not)
24 violate standards. Rather, the expert should be asked for his or her opinion based —
25 explicitly — upon an assumed fact scenario. This will make clear that the witness is
26 not attempting to make credibility and fact findings and thereby to invade the province
27 of the jury. Of course, a qualified expert can testify to relevant customs, usages,
28 practices, recognized standards of conduct, and other specialized matters beyond the

1 ken of a lay jury. This subject is addressed further in the trial guidelines referenced in
2 paragraph 16 below.

3 9. Counsel need not request a motion hearing date and may notice non-discovery motions
4 for any Thursday (excepting holidays) at 8:00 a.m. The Court sometimes rules on the
5 papers, issuing a written order and vacating the hearing. If a written request for oral
6 argument is filed before a ruling, stating that a lawyer of four or fewer years out of law
7 school will conduct the oral argument or at least the lion's share, then the Court will
8 hear oral argument, believing that young lawyers need more opportunities for
9 appearances than they usually receive. Discovery motions should be as per the
10 supplemental order referenced in paragraph 16 and shall be expedited.

11 10. The last date to file dispositive motions shall be **SEPTEMBER 6, 2012**. No dispositive
12 motions shall be heard more than 35 days *after* this deadline, *i.e.*, if any party waits
13 until the last day to file, then the parties must adhere to the 35-day track in order to
14 avoid pressure on the trial date. Absent extraordinary circumstances, no party should
15 have more than one shot at summary judgment.

16 11. The **FINAL PRETRIAL CONFERENCE** shall be at **2:00 P.M. on OCTOBER 10, 2012**.
17 Although the Court encourages argument and participation by younger attorneys, lead
18 trial counsel must attend the final pretrial conference. For the form of submissions for
19 the final pretrial conference and trial, please see paragraph 18 below.

20 12. A **JURY TRIAL** shall begin on **OCTOBER 22, 2012**, at **7:30 A.M.**, in Courtroom 9,
21 19th Floor, 450 Golden Gate Avenue, San Francisco, California, 94102. The trial
22 schedule and time limits shall be set at the final pretrial conference. Although almost
23 all trials proceed on the date scheduled, it may be necessary on occasion for a case to
24 trail, meaning the trial may commence a few days or even a few weeks after the date
25 stated above, due to calendar congestion and the need to give priority to criminal trials.
26 Counsel and the parties should plan accordingly, including advising witnesses.

27 13. Counsel may not stipulate around the foregoing dates without Court approval.
28

- 1 14. While the Court encourages the parties to engage in settlement discussions, please do
2 not ask for any extensions on the ground of settlement discussions or on the ground that
3 the parties experienced delays in scheduling settlement conferences, mediation or ENE.
4 The parties should proceed to prepare their cases for trial. No continuance (even if
5 stipulated) shall be granted on the ground of incomplete preparation without competent
6 and detailed declarations setting forth good cause.
- 7 15. To avoid any misunderstanding with respect to the final pretrial conference and trial,
8 the Court wishes to emphasize that all filings and appearances must be made — on pain
9 of dismissal, default or other sanction — unless and until a dismissal fully resolving
10 the case is received. It will not be enough to inform the clerk that a settlement in
11 principle has been reached or to lodge a partially executed settlement agreement or to
12 lodge a fully executed agreement (or dismissal) that resolves less than the entire case.
13 Where, however, a fully-executed settlement agreement clearly and fully disposing of
14 the entire case is lodged reasonably in advance of the pretrial conference or trial and
15 only a ministerial act remains, the Court will arrange a telephone conference to work
16 out an alternate procedure pending a formal dismissal.
- 17 16. If you have not already done so, please read and follow the “Supplemental Order to
18 Order Setting Initial Case Management Conference in Civil Cases Before Judge
19 William Alsup” and other orders issued by the Clerk’s office when this action was
20 commenced. Among other things, the supplemental order explains when submissions
21 are to go to the Clerk’s Office (the general rule) versus when submissions may go
22 directly to chambers (rarely). With respect to the final pretrial conference and trial,
23 please read and follow the “Guidelines For Trial and Final Pretrial Conference in Civil
24 Jury Cases Before The Honorable William Alsup.” All orders and guidelines
25 referenced in the paragraph are available on the district court’s website at
26 <http://www.cand.uscourts.gov>. The website also includes other guidelines for
27 attorney’s fees motions and the necessary form of attorney time records for cases
28

1 before Judge Alsup. If you do not have access to the Internet, you may contact Deputy
2 Clerk Dawn K. Toland at (415) 522-2020 to learn how to pick up a hard copy.


3 17. This matter is hereby **REFERRED** to **MAGISTRATE JUDGE ELIZABETH D. LAPORTE** for
4 **SETTLEMENT/MEDIATION**, the Court believing that such a conference would be more
5 effective in settling the present case than any other avenue.

6 18. This confirms **REFERRAL** to **MAGISTRATE JUDGE JOSEPH C. SPERO** (already
7 assigned) of all discovery motions. The deadline for bringing all discovery motions or
8 extension motions based on discovery violations will be **45 CALENDAR DAYS** prior to
9 the fact discovery cutoff (for fact discovery) and **TEN CALENDAR DAYS** prior to the
10 expert discovery cutoff (for expert discovery). The purpose of these lead times is to
11 allow briefing, resolution and follow-up, to the extent practical, before the discovery
12 cutoffs.

13 19. All pretrial disclosures under FRCP 26(a)(3) and objections required by FRCP 26(a)(3)
14 must be made on the schedule established by said rule.

15
16 **IT IS SO ORDERED.**

17
18 Dated: April 5, 2012.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE